

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION (ST) NO. 8555 OF 2019

Surendra Navnitrai Sanghvi
and ors.

.. Applicants
(Org. Defendants)

vs.

Smt. Chandrakumari Harnamsingh
Chowhan (deleted)
Shri. Kamlesh Singh Harnamsingh
Chowhan

.. Respondent
(Org. Plaintiff)

Mr. S. Malik a/w. Mr. Ashwin Vasista I/b Singhania and Co.
for the Applicants.

Mr. Vivek Kantawala a/w. Mr. Amey Patil, Shanay Bafna I/b
M/s. Vivek Kantawala & Company for the Respondent.

CORAM : R. G. KETKAR, J.

RESERVED THE ORDER : 18 JULY 2019.

PRONOUNCED THE ORDER : 5 AUGUST 2019.

PC :-

1] Heard Mr. S. Malik, learned counsel for the applicants
and Mr. Vivek Kantawala, learned counsel for the respondent
at length.

2] By this application under Section 115 of the Code of
Civil Procedure, 1908 (for short "CPC"), the applicants,
hereinafter referred to as the defendants, have challenged the
judgment and decree dated 23rd January 2013 passed by the

learned Judge, Small Causes Court at Mumbai in R.A.E. Suit No. 525/867 of 2000 as also the judgment and decree dated 25th January 2019 passed by the Appellate Bench of the Small Causes Court in Appeal No. 65 of 2013.

3] By these orders, the Courts below decreed the suit instituted by the respondent, hereinafter referred to as the plaintiff and directed the defendants to hand over vacant and peaceful possession of Room No. B-42, 3rd Floor, Lalsingh Mansingh Building, Seikh Memon Street, Mumbai – 400 002 (for short '*suit premises*') to the plaintiffs. The Courts below held that the plaintiff is also entitled to future mesne profits from the date of decree till delivery of possession of the suit premises and ordered separate enquiry be held as per Order XX Rule 12 (1)(c) of the CPC.

4] Smt. Chandrakumari Harnamsingh Chowhan since deceased had instituted the suit against Narendra Navnitrai Sanghvi since deceased and Surendra N. Sanghvi *inter alia* contending that the defendants have acquired suitable alternative residential accommodation; that they have

changed the user of suit premises from the residential purposes to commercial purposes; that they have not used the suit premises without reasonable cause for the purpose for which they were let out for a continuous period of six months immediately preceding the date of the suit; that the defendants have unlawfully sublet, assigned or transferred in any other manner his interest in the suit premises in favour of third party; that the defendants have erected structure of permanent nature in the suit premises without consent in writing of the plaintiff; that the defendants have caused waste and damage to the suit premises. The plaintiff further contended that she required the suit premises for reasonably and *bona fide* for personal use and occupation. By order dated 23rd January 2013, the learned Trial Judge decreed the suit. The learned Trial Judge held that the plaintiff proved that the defendants have acquired suitable alternative residential accommodation [Section 13(1)(l) of the Bombay Rents, Hotel and Lodging House Rates Control Act, (for short “Act”); that the plaintiff proved that the defendants have changed the user of the suit premises from residential to non-residential purposes by starting business and office

activities in the suit premises – (Section 13(1)(a) of the Act); that the plaintiff proved that the defendants have unlawfully sublet, assigned or transferred in any other manner his interest of the suit premises in favour of the stranger or third person (Section 13(1)(e) of the Act); that the plaintiffs proved that the defendants have not used the suit premises without reasonable cause for the purpose for which they were let for a continuous period of six months immediately preceding the date of the suit (Section 13(1)(k) of the Act). The learned Trial Judge declined to pass decree on the ground that the defendants have erected permanent nature of construction in the suit premises without consent in writing of the plaintiff (Section 13(1)(b) of the Act) and that the defendants have caused waste and damage to the suit premises (Section 13(1)(a) of the Act read with Section 108 (o) of the Transfer of Property Act, 1882 (for short “*T.P. Act*”).

5] Aggrieved by this decision, the defendants preferred appeal. By order dated 25th January 2019, the Appellate Court dismissed the appeal. The Appellate Court held that the suit instituted by the plaintiff is maintainable; that the

plaintiff proved that the defendants have acquired suitable alternative residential accommodation; that the defendants have changed the user of suit premises; that the defendants without consent of the plaintiff have unlawfully sublet, assigned or transferred in any other manner his interest in the suit premises in favour of third party; that the defendants have not used the suit premises without reasonable cause for the purpose for which they were let for a continuous period of six months immediately preceding the date of the suit. Thus, the Appellate Court affirmed the decree passed by the learned Trial Judge under Section 13(1) (l), 13 (1)(a), 13(1)(e) and 13(1)(k) of the Act and declined to pass the decree under Section 13(1)(a) of the Act read with Section 108 (o) of the T.P. Act as also under Section 13(1)(b) of the Act. It is against these orders, the defendants have instituted the present civil revision application.

6] In support of this civil revision application, Mr. Malik contended that the Courts below committed serious error in decreeing the suit. He submitted that the plaintiff is neither landlord nor owner of the suit premises. Assuming for the

sake of arguments without conceding that the plaintiff is one of the co-owners, he has not impleaded other co-owners. The Appellate Court was therefore, not justified in holding that the suit is maintainable.

7] Mr. Malik submitted that the plaintiff did not approach the Court with clean hands. He invited my attention to paragraph No.2 of cross-examination of PW-1 Kamlesh Singh Chowhan. He denied that there is no physical division or partition of suit building. He pleaded ignorance about the suit instituted by Pushpendra Singh in Mainpuri Court in Uttar Pradesh.

8] Mr. Malik further submitted that before the Appellate Court additional written arguments were filed on 25th January 2019. The Appellate Court however, ignored the additional written arguments. In fact, the Appellate Court did not deal with the contentions raised in the said written arguments.

9] Elaborating his submission that the plaintiff is neither a landlord nor owner of the suit premises, he submitted that Suit No. 68 of 1972 was filed for partition in Mainpuri Court, U.P. The suit was decided on 23rd April 1982. Against that decision, First Appeal No. 407 of 1982 was preferred in Allahabad High Court. First Appeal was decided on 14th December 2012. He has taken me through the decision of the first appeal. In particular, he gave emphasis on the following portions of that decision:

“It shall be open to the other co sharers to take appropriate steps for carvation of their separate shares. In the final decree, the total area of the property in dispute is 13551 square yards. The area of portion marked with red colour is 589 square yards while of green colour is 766 square yards. The portion marked with red colour, the north portion, sub division shown by letter 'P' has been given to Harnam Singh (defendant no.1) and Kr. Pushpendra Singh, (Plaintiff). It consist of 11 shops 4 godowns 31 rooms, 15 W.Cs., 10 bathrooms and one stair case as detailed in Chart II in report of the Commissioner. The portion which has been marked by green colour and has been allotted to the present appellants and other defendant nos.2,4,5 & 6 to 9 consist of 16 shops and one godown 4 wooden stalls, 51 rooms, 15 W.Cs 10 bathrooms one stair case, one lift, one well with water pump as detailed in Chart – II of the Commissioner’s report. It finds mention in the Commissioner’s report that the dividing line between the two portions has been selected in such a manner so that it possess in such a way just at the places where generally the walls exist. It also divides the building vertically upwards and as is also clear from the map as

also from annexures 2 to 4 to the Commissioner's report.

Taking a overall view of the situation, the Commissioner was conscious about the practical difficulties of the parties and he has taken a note of them while proposing the quras. Significantly, the learned counsel for the the appellants could not point out that the appellants in any way have got less by the proposed quras to what they were entitled to under the decree. He could not show, the prejudice if any, caused to the appellants except that the quras of all the parties should be carved out separately. The objection of the appellants is technical in nature, where the decision is correct on merits and within the jurisdiction of the court, no error, defect or irregularity, which does not go to the root of the matter will vitiate the order or invalidate the actions, as has been held by the Apex Court in **Muhammad Husain versus Baba Kisna Nandan AIR 1937 P.C 238, Kiran Singh versus Chaman Pasan AIR 1954 SC 340. (Page 321 of CRA Compilation)**

....

Therefore, the argument of the learned counsel for the appellants does not hold good that there is complete bar regarding alteration, addition or transfer of part of the demised premises. Equally it is important that partition is not a transfer of property. The partition can be effected on papers and now under the partition scheme, the two quaras are well defined. There are hundreds of tenants in the property in suit. They are living separately with their families or doing separate businesses. This is indicative of the fact that the property in dispute consist of number of tenements. In the final partition scheme, the Commissioner has consciously after weighing all the pros and consequences has chalked out partition scheme by metes and bounds in such a manner by providing that two quras should be separated vertically and the common partition wall will pass generally on the existing walls, just at the places where generally walls exist.

This disposes of the last submission made by the appellant.”

10] Mr. Malik has taken me through cross-examination of PW-1. He also relied upon the decision of this Court in ***Kamlesh Singh Harnamsingh Chowhan vs. Kishorsingh Gangasingh Chowhand – 2010 (3) ALLMR 313*** and in particular paragraph No.4. In paragraph No.4, the Division Bench of this Court referred to the partition suit filed in the Court of Additional District Judge, Mainpuri, Uttar Pradesh by one of the co-owners Pushpendra Singh Kama for partition of the properties including Lalsingh Mansingh Building being Original Suit No. 68 of 1972, wherein the testator Gangasingh Chowhan and the appellant Kamlesh Singh Chowhan were sued as defendants. Under a final decree passed by the Court on 23rd April 1982, late father of the petitioner, Harnamsingh got a particular share in respect of properties including the said Lalsingh Mansingh Building which stood partitioned under the decree. According to the petitioner, under the above decree the share which came in favour of his late father Harnamsingh consisted of 11 shops, 4 go-downs, 31 rooms, 15 W.Cs. 10 bathrooms

and one staircase in the building.

11] Relying heavily upon the decision of the Allahabad High Court dated 14th December 2012 in First Appeal No. 407 of 1982, Mr. Malik submitted that total area of the property in dispute is 13551 square yards. The area of portion marked with red colour is 589 square yards, while the area shown in green colour is 766 square yards. The portion marked with red colour, the north portion, sub division shown by letter 'P' has been given to Harnam Singh (father of plaintiff) and Pushpendra Singh. The portion which has been marked by green colour and has been allotted to the Ishwar Singh (appellant) and other defendants namely defendant Nos.2,4,6 and 6 to 9 consist of 16 shops and one go-down, 4 wooden stalls, 51 rooms, 15 W.Cs., 10 bathrooms, one stair case, one lift, one well with water pump as detailed in Chart – II of the Commissioner's report. Thus, he submitted that the partition is effected by meets and bounds and the suit premises did not fall to the share of Harnam Singh, father of the plaintiff. Thus, the plaintiff is neither landlord nor owner of the suit premises. The Courts below, therefore, were not justified in

passing the impugned decree.

12] Mr. Malik invited my attention to paragraph 4 of the written argument dated 10th January 2019. In paragraph 4, the defendants have contended that they have no quarrel with findings of the issues except issue Nos.7,8 and 9 recorded by the Trial Court. It is the case of the defendants that even if there are grounds for passing of eviction decree, the plaintiff is not the owner or landlord of the suit premises and therefore, not entitled to recover vacant peaceful possession of the suit premises. The suit is not maintainable and therefore, the Courts below were not justified in passing the eviction decree.

13] On the other hand, Mr. Kantawala has supported the impugned orders. He has invited my attention to the evidence of DW-1 Surendra Navanitrai Sanghvi. In paragraph 3 of examination-in-chief, the witness stated that the plaintiff is only a part owner of the suit building and there are other co-owners who have disputed the plaintiff's claim to the suit property. Thus, the witness admitted that the plaintiff is one

of the co-owners. He also invited my attention to the cross-examination of this witness, where he admitted that he is defendant No.2 in the proceeding. He is not recalling whether he had filed the written statement or defendant No.1 has filed the written statement. Defendant Nos.1 and 2 have filed the written statement. The witness has verified the written statement. Defendant No.1 had given information to the advocate for drafting the written statement. The witness admitted that he is not aware about the contents of the written statement filed by the defendants. He however, admitted that even though he has verified the written statement, he does not know the contents of written statement filed by the defendants.

14] In paragraph 2 of the cross-examination, the witness was shown affidavit-in-examination. He admitted that he had given instructions to the advocate for preparation of examination-in-chief affidavit Exhibit-86. He did not go through the contents of his examination-in-chief. He did not feel it necessary to ask the Advocate to explain the contents of examination-in-chief to him. He did not ascertain before

putting signature on the written statement and examination-in-chief affidavit whether the contents of the written statement or examination-in-chief affidavit are true or not.

15] In paragraph 3, the witness admitted that he does not know the contents of the examination-in-chief affidavit. He is not in a position to answer the questions put to him on the basis of his examination-in-chief. He has not checked the proceedings of various Courts as mentioned in para Nos. 4 to 13 of his examination relating to O.S. Suit No. 68 of 1972 filed for partition before the First Additional District Judge, Mainpuri Court, U.P.. He has no personal knowledge about court proceedings mentioned in paragraphs 4 to 13 of examination in chief.

16] In paragraph 4, the witness admitted that he did not mention Flat Nos.307 and 308 purchased by him in Poonam Apartments, Worli in examination-in-chief. He however, admitted that he did not deny the grounds of non-user of the suit premises, unlawful subletting of the suit premises and acquisition of alternate premises being Flat Nos. 308 and 307

in Poonam Apartments, Worli. In paragraph 5, he admitted that his application to issue summons to Iswarsingh Chouhan was rejected by order dated 20th June 2012.

17] In cross-examination, DW-1 admitted that he did not remember in which address the suit summons was served on him. He was shown certified copy of suit summons and was put questions whether the suit summons was served on him on the address of Worli, Mumbai. DW-1 stated that Mr.Hiten Sanghavi has accepted the suit summons. (Hiten Sanghavi is the son of original defendant No.1.) DW-1 further admitted that Hiten had accepted the suit summons on his behalf because he was staying in Worli premises. DW-1 further admitted that his Ration Card bears the address of Worli premises. Worli address is shown on Ration Card because DW-1 is staying in the premises at Worli being Flat No.C/308 and 307, Poonam Apartment Worli, Mumbai.

18] In paragraph 3, DW-1 admitted that he did not produce any electricity bill of the suit premises. His attention was invited to electricity bill for the month of March 2000. He

admitted that the electricity consumption shown Zero in the electricity Bill Exhibit-32. He however, stated that at that time electricity meter of the suit premises was out of order. DW-1 admitted that he did not complain in writing about disorder of electricity meter in the suit premises. DW-1 further admitted that he is residing at Worli, Mumbai and one Chandrakant Govind Ghare, his employee is residing in the suit premises since 2006. He did not obtain permission in writing of the plaintiff for permitting Chandrakant Ghare to reside in the suit premises.

19] Mr. Kantawala also invited my attention to the evidence of PW-2 Prashant Das, Joint Secretary of Poonam Property Cooperate Housing Society. He submitted that from the admissions given by the defendant's witness, it is clear that the witness did not deny grounds of eviction namely (i) non-user of suit premises; (ii) unlawful subletting of the suit premises; (iii) acquisition of suitable alternate residential accommodation.

20] Mr. Kantawala relied upon the decision dated 19th October 2016 in Civil Revision Application (St) No. 28771 of 2016 (**Ratilal Bhagwandas Sanghvi vs. Smt. Chandrakumari Harnamsingh Chowhan (deleted) through Kamlesh Singh Harnamsingh Chowhan**) and in particular paragraph 7, where decision of the Division Bench in *Kamlesh Singh Chowhan (supra)* was considered. In paragraph 8, it was held that so long as the partition is not effected by metes and bounds, it is settled law that every co-owner has interest in the entire property and no co-owner can claim with certainty that he is owner of a particular property. He submitted that even in the present case, after appreciating the evidence on record, the Courts below have concurrently held that the partition is not effected by metes and bounds. He submitted that the Courts below were fully justified in holding that the suit filed by the plaintiff is maintainable. He therefore, submitted that no case is made out for invocation of powers under Section 115 of CPC.

21] I have considered the rival contentions advanced by both the parties. I have also perused the material on record.

In paragraph 3 of the plaint, the plaintiffs asserted that they are co-owners of Lalsingh Mansingh Building wherein Navnitrai Harilal was a monthly tenant in respect of suit premises. The defendants filed written statement dated 12th July 2001. In paragraph 2(a), the defendants had contended that by order dated 29th April 1970 of this Court, Harnamsingh Motisingh Chouhan (father of the 2nd plaintiff) and Gangasingh Motisingh Chouhan were appointed as Joint Manager of Lalsingh Mansingh Building. In paragraph 2(b), the defendants contended that Pushpendra Singh, one of the co-owners filed a partition suit in Mainpuri Court, Uttar Pradesh. During pendency of the suit, Harnamsingh Motisingh Chouhan died on or about 10th November 1984. The second plaintiff claimed that after the death of his father, he would like to manage the various properties together with Gangasingh Motisingh Chouhan. Gangasingh Chouhan objected to the same and an application was filed by the plaintiffs in Allahabad High Court. By order dated 25th February 1985, Allahabad High Court appointed Gangasingh Chouhan and Chandrakumari widow of Harnamsingh to jointly manage the properties in dispute in terms of the

Agreement dated 29th April 1970 incorporated in the order dated 29th April 1970 passed by this Court. In paragraph 2(c), reference was made to Point No.6 in the letter dated 21st December 1985. In paragraph 2(e), the defendants contended that any action including the present suit was and is required to be taken jointly by both the Joint Authorised Managers, in accordance with the terms and conditions as set forth hereinabove.

22] I have already referred to paragraph 3 of examination-in-chief of DW-1, where DW-1 admitted that the plaintiff is only a part owner of the suit building. That apart, in paragraph 17, the Appellate Court observed that when the suit was filed in the year 2000, the plaintiff was the co-owner of the suit premises. So also when the suit was decreed in the year 2013, the plaintiff was co-owner of the suit premises. The Appellate Court held that it is settled law that a suit for eviction under Maharashtra Rent Control Act can be filed by any of the co-owners against the tenant. Even at this moment the defendants have not brought on record the documents with regard to execution of the partition decree.

There is nothing on record which reveals that the suit premises is effectively partitioned and its possession is given to respective share holders as per decree of the District Court, Mainpuri, U.P.. Hence, it is clear that the suit premises is not yet partitioned by metes and bounds. So long as the partition is not effected by metes and bounds, it is settled law that every co-owner has interest in the entire property and no co-owner can claim with certainty that he is owner of a particular property. There is nothing on record which reveals that the partition is effected by metes and bounds.

23] During the course of hearing, I repeatedly called upon Mr.Malik to produce the material showing that in pursuance of order passed by Allahabad High Court in First Appeal No. 407 of 1982, the partition is effected by metes and bounds. However, he was unable to show any material indicting that the partition is effected by metes and bounds.

24] As mentioned earlier, witness examined by the defendants he did not deny the grounds of

non-user of the suit premises, unlawful subletting of the suit premises and acquisition of alternate premises being Flat Nos.308 and 307 in Poonam Apartments, Worli. The entire burden of song of the defendants is that the plaintiff is neither landlord nor owner of the suit premises as the partition is effected by metes and bounds in pursuance of the order passed by the Allahabad High Court in First Appeal No. 407 of 1982. In the light of aforesaid discussions, I do not find that the Courts below had committed any error in passing the eviction decree. The defendants are not in a position to demonstrate that the findings recorded by the Courts below are contrary to the evidence on record or that they are based on evidence. Merely because on the basis of evidence on record, another view is possible, that itself is not a ground for invocation of powers under Section 115 of the CPC.

25] In short, the defendants have not shown that the findings recorded by the Courts below are perverse. Hence, the Civil Revision Application fails and is hereby dismissed. The ad-interim order stands vacated.

26] The matter was mentioned by Mr. Malik on 23rd July 2019 for filing written arguments. It was made clear that the application was heard at length on 18th July 2019 and was reserved for orders. It is therefore, not possible to accede to the request made by Mr. Malik for filing of the written arguments. Even otherwise, Sub-rule (3-A) of Order XVIII Rule 2 of CPC lays down that any party may address oral arguments in a case, and shall, before he concludes the oral arguments, if any, submit if the Court so permits concisely and under distinct headings written arguments in support of his case to the Court and such written arguments shall form part of the record; Sub-rule (3-B) lays down that a copy of such written arguments shall be simultaneously furnished to the opposite party; and Sub-rule (3-C) lays down that no adjournment shall be granted for the purpose of filing the written arguments unless the Court, for reasons to be recorded in writing, considers it necessary to grant such adjournment.

(R. G. KETKAR, J.)